

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-6156

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
SAMUEL M. KAYNARD, REGIONAL DIRECTOR OF
REGION 2 OF THE NATIONAL LABOR RELATIONS
BOARD, FOR AND ON BEHALF OF THE NATIONAL
LABOR RELATIONS BOARD,

Petitioner-Appellant,

v.

JOINT INDUSTRY BOARD OF THE ELECTRICAL
INDUSTRY AND PENSION COMMITTEE, JOINT
INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY,
AND TRUSTEES OF THE PENSION, HOSPITALIZA-
TION AND BENEFIT PLAN OF THE ELECTRICAL
INDUSTRY,

Respondents-Appellees.

-----X
ON APPEAL FROM AN ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

BRIEF FOR RESPONDENTS-APPELLEES

DONALD F. MENAGH
Attorney for Respondents-
Appellees
Office & P.O. Address:
130 East 40th Street
New York, New York 10016
(212) 532-3850

IRWIN GELLER,
of Counsel

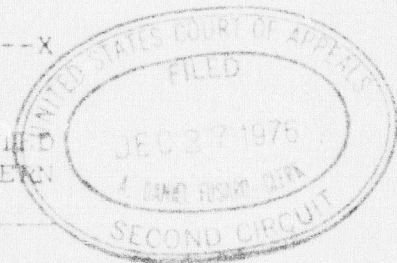


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS	ii
STATEMENT OF FACTS	1
ARGUMENT AND AUTHORITIES	25
I. NO 10(j) INJUNCTION HAS EVER ALTERED THE FINANCIAL STATUS OF THE PARTIES; HERE THE LABOR BOARD IS DEMANDING THAT THE PENSION COMMITTEE LOSE \$1 MILLION A YEAR PRIOR TO ANY ADJUDICATION	25
II. THE STANDARD APPLIED TO FIND "REASONABLE CAUSE" IN THIS CASE WILL NOT SUPPORT THE DRASTIC RELIEF REQUESTED.32
III. THE DENTAL DEPARTMENT SHOULD NOT BE ORDERED TO REOPEN TO GIVE MEANING TO A BARGAINING ORDER, PARTICULARLY SINCE ANY ORDER TO REOPEN WOULD BE CONTRARY TO PRECEDENT.36
IV. A BARGAINING ORDER HEREIN WOULD BE EMPTY, PREJUDICIAL AND COERCIVE.39
V. THE DISTRICT COURT'S ORDER PROTECTS THE STATUS QUO IN THE ONLY EQUITABLE WAY AND ALSO PROTECTS THE INTEREST OF EMPLOYEES, THE ACT AND THE PUBLIC.45
CONCLUSION.48
APPENDIX.49

TABLE OF CITATIONS

<u>A] Court cases:</u>	<u>Page</u>
<u>Angle v. Sacks</u> , 382 F. 2d 655 (10th Cir., 1967).....	25
<u>Boire v. Pilot Freight Carriers, Inc.</u> , 515 F. 2d 1185 (5th Cir., 1975).....	31, 34
<u>Danielson v. Jt. Board of Coat, Suit & Allied Garment Workers' Union</u> , 494 F. 2d 1230 (2nd Cir., 1974).....	31
<u>Davis v. R. G. LeTourneau, Inc.</u> , 340 F. Supp. 882 (E.D. Tex., 1971).....	26-27
<u>Elliot v. Dubois Chemicals, Inc.</u> , 201 F. Supp. 1 (N.D. Tex., 1962), 49 LRRM 2238 (N.D. Tex., 1961)	27-28
<u>Hecht Co. v. Bowles</u> , 321 U.S. 321 (1944).....	31
<u>Johansen v. Queen Mary Restaurants</u> , 86 LRRM 2813 (C.D. Cal., 1974).....	29, 41
<u>Johnston v. Hackney & Sons, Inc.</u> , 71 LRRM 2618 (E.D. N.C., 1969).....	29-30, 31
<u>Kaynard v. Lawrence Rigging, Inc.</u> , 80 LRRM 2600 (E.D., N.Y. 1972)	41
<u>McLeod v. General Electric Co.</u> , 366 F. 2d 847, (2nd Cir., 1966), vacated as moot, 385 U.S. 533....	31
<u>Mount Hope Finishing Co., Inc. v. NLRB</u> , 211 F. 2d 365 (4th Cir., 1954)	37
<u>NLRB v. Adams Dairy, Inc.</u> , 350 F. 2d 108 (8th Cir., 1965), following remand in 379 U.S. 644 (1965).....	40
<u>NLRB v. Burns Int'l Detective Agency, Inc.</u> , 364 F. 2d 897 (8th Cir., 1965).....	37
<u>Potter v. United Foods, Inc.</u> , 58 LRRM 2469 (S.D. Tex., 1965).....	27
<u>Reynolds v. Curley Printing Co., Inc.</u> , 247 F. Supp. 317 (M.D. Tenn., 1965).....	27, 33

<u>Seeler v. Trading Port, Inc.</u> , 88 LRRM 3293 (N.D. N.Y., 1974)	28-29
<u>Seeler v. Trading Port, Inc.</u> , 517 F. 2d 33, (2nd Cir., 1975)	32-33, 34, 36, 37, 43, 46
<u>Smith v. Old Angus, Inc.</u> , 81 LRRM 2936 (D. Md., 1972)	26
<u>Textile Workers, TWUA v. Darlington Mfg. Co.</u> , 389 U.S. 263 (1965)	38
<u>United Auto Workers v. NLRB</u> , 449 F. 2d 1046, (D.C. Cir., 1971)	41
B] <u>Board cases:</u>	
<u>Cumberland Shoe Corp.</u> , 156 NLRB No. 103 (1966)	37
<u>Elm Hill Meats of Owensboro</u> , 213 NLRB No. 100, (1974)	37, 40
<u>George Lithograph Company</u> , 204 NLRB No. 50 (1973) ...	38
<u>McLoughlin Mfg. Corp.</u> , 164 NLRB No. 23 (1967)	34
<u>Thompson Transport Co.</u> , 165 NLRB No. 96 (1967)	34
<u>Wagoner Water Heater Co., Inc.</u> , 203 NLRB No. 84 (1973)	34
C] <u>Statutes:</u>	
National Labor Relations Act, as amended, 29 U.S.C. 160(j), Section 10(j)	25, 26, 28, 31, 32, 33, 34, 41

STATEMENT OF FACTS

The Pension Committee of the Joint Industry Board of the Electrical Industry administers a joint Union-Employer pension and welfare plan maintained, pursuant to agreement, by Local Union No. 3, IBEW, AFL-CIO and employers in the New York electrical contracting industry. It is financed through payroll-based employer contributions. The Joint Industry Board supervises the administration of the Pension Committee's plans and other joint plans established by Local Union No. 3 and employers. The Joint Industry Board has a Chairman, who is the Chief Administrator of all the plans, and a Director of Administration, who also serves as Director of Administration of the Pension Committee of the Joint Industry Board (A. 264; A. 375-376; Pension, Hospitalization Benefit Plan of the Electrical Industry, Section 11, Appellant's Exhibit 8).

On April 29, 1976 the Administrators of the Pension Committee decided to shut down the Committee's Dental Department; the next day it was shut down, except for close-out procedures handled by a single dentist (A. 335-336, 314-315).

A] The financial condition of the Pension Committee at all relevant times:

The shut-down of the Dental Department followed six solid months of horrendous financial developments. The losses that were reflected, and which burgeoned, during the six-month period had been accumulating since early 1975, when the depression in the local building construction trades became pronounced. The

result was that benefits had to be cut and other economics effected. A thorough consideration of which benefits should be eliminated led to the shutdown of the Dental Dept. The Labor Board's accusation that antiunion animus caused the shutdown is unfounded.

At the bi-monthly meeting of the Board of Trustees of the Pension Committee held October 27, 1975, the Trustees were presented with a financial report which disclosed an annual operating loss through September 30, 1975 of approximately \$1 1/2 million (A. 258, 263, 548).

The next meeting of the Board was in December, 1975. The loss for the first two months of the fiscal year (October and November, 1975) was \$400,000. If losses continued at that rate, the loss for the year would have been \$2 1/2 million, or \$1 million greater than for fiscal 1975 (A. 271-273, 550).

In February, 1976 the next Board meeting was held. On the agenda was the certified accountants' report for the year ending September 30, 1975. The earlier year-end financial report was unofficial, prepared without the benefit of an audit and a full awareness of accruals. The official report put the operating loss for fiscal 1975 at \$1 million more than had been reported at the October Board meeting (A. 261, 264-268, 282-286, 552-555). At the same time, the regular two-month financial statement was read. It showed losses for December, 1975 and January, 1976 in the amount of approximately \$700,000. The accelerated rate of the losses of the two previous months had accelerated further.

Even if the rate of loss were to be held to \$1.1 million per four months, the losses for fiscal 1976 would have been considerably greater than the revised \$2.5 million deficit for fiscal 1975 (A. 288-291, 564).

The Trustees met next on April 28, 1976. In February and March, 1976 the loss had grown by \$1.2 million -- more than the losses of the combined first four months of the fiscal year (A. 315-318, 566). Throughout March, the Pension Committee suffered its worst cash position in memory. Money was not available to make benefit payments, with the result that hospitalization and major medical checks were held up for five weeks. At the conclusion of March the actual cash deficit had reached \$340,000 (A. 300-301). At the rate that losses were mounting, the Pension Committee's reserves would be depleted by an additional \$5 million, and possibly more, by September 30, 1976. This would be in addition to the \$2 1/2 million deficit for fiscal 1975 (A. 318).

B] The reaction of the Pension Committee to its deteriorating financial condition:

1) At the October, 1975 Board meeting of the Pension Committee, the Administrators were asked whether the deficits (then understated at \$1 1/2 million for fiscal 1975) would continue. The Administrators projected that the bleak employment outlook would yield further losses to the Committee (A. 264). At that same October meeting a report that had been prepared at the request of the Chairman of the Joint Industry Board was delivered. It was a report of benefit reductions made necessary by the

deteriorating financial condition of other employee benefit plans in the New York area building construction trades (A.274-277).

Also in October, 1975, the dentists in the Dental Department were told that contrary to established practice they would not receive pay raises due to the poor financial condition of the Pension Committee. This news was reported generally as well as to the three-dentist "steering committee" selected by the dentists for the purpose of facilitating raises (A. 158-160, 366, 436-438).

2) At the December, 1975 Board meeting, the report of further losses was greeted by references to the earlier report on benefit cutbacks by other construction industry benefit plans, and by inquiry as to whether the Committee could maintain current benefit levels with deficits spiraling as they were (A. 274-276).

Also in December, 1975 the Director of Administration of the Pension Committee instructed the Director of the Dental Department to cut back drastically on his purchase of dental supplies at the dental supply convention in December. The instructions were complied with (A. 367).

Another harbinger of things to come was the December meeting of the Board of Trustees of the Joint Industry Board (as distinct from the separate Board of the Pension Committee). Consideration was given at the meeting to denying welfare benefits to persons unemployed for a period of time. The proposal was rejected amidst recognition of the plight of the Joint Industry

Board and its related funds. A similar meeting had been held by the Subcommittee of the Pension Committee (A. 277-280).

3) The Trustees reacted to the disclosures of February, 1976, by noting that the deficits were increasing at a more rapid rate than they had been, and that the deficits would probably become still greater in view of the worsening economic conditions in the industry in the latter part of 1975. A Union Trustee emphasized that they would have to be very careful with the remaining surpluses in the fund balance, since it took 30 years to create those surpluses. Ultimately the administrators of the Joint Industry Board and the Pension Committee were directed by the Chairman of the Board of Trustees of the Pension Committee to monitor the expenses of the welfare account and "to make any and all attempts to reduce the deficit". It was requested with great urgency that all ways in which benefits or expenses could be reduced be studied. (A. 286-287)

A number of these Trustees were also Trustees of the Vacation Plan administered by the Joint Industry Board. Only days before the vacation benefit had been cut by 7% across-the-board for all participants to preserve the remaining balance in that Fund (A. 301-302, 325-326, 327, 329).

Immediately upon the conclusion of this meeting, the Chairman of the Joint Industry Board, the Director of Administration of the Pension Committee and the Assistant Director of Administration began to review the various welfare benefits administered by the Pension Committee for the sole purpose of cutting

benefits or costs (A. 293-300, 389). There was consideration given to reducing the benefits grouped as hospitalization and major medical benefits, but this course was quickly rejected (A. 339-340, 389). The reason for this decision was the very serious impact that any such cutback would have had on all participants. Instead, in the early part of March, 1976, the Assistant Director of Administration commenced a study of how direct payment to hospitals might reduce the cost of the benefit without reducing the health service aspect of the benefit (A. 294-296).

The remaining benefits were also scrutinized in terms of the level of services rendered, the practicality (from the vantage point of the broad range of participants) of obtaining the benefit, the relative value of the benefit as a health care service, the value placed upon the benefit by Union and Employer representatives, and the savings that would be effected by reduction or elimination of the benefit. Beginning in early March, the Chairman of the Joint Industry Board met with the Director of Administration of the Pension Committee at least once a week to discuss the reduction or elimination of benefits and benefit costs, and the Director of Administration and the Assistant Director conferred at least once daily on this subject. The Directors of the Dental Department and of the Medical Department were continually questioned during this period by the administrators as to possibilities for savings and about the status of scheduling and workloads in the various sections of the Departments (A. 296-300, 303-307, 340-342, 344-345, 349, 399-400).

Still in the early part of March, 1976, a question arose concerning the hiring of dentists. The workload in the Dental Department mounted as the unemployment picture grew more somber, with participants who formerly had found it more convenient to use family dentists now preferring the free dental service rendered in the Dental Department. The Director of the Dental Department felt that at a minimum dentists who had terminated their relationship with the Department in the months prior to March had to be replaced to cope with the unprecedented congestion, and he proceeded to put on new dentists. On March 8, 1976, after hiring a dentist -- but before restoring the number of total hours that had been available to the Department at previous, less busy times -- the Director of the Dental Department was summoned to the office of the Director of Administration of the Pension Committee and was told in no uncertain terms to stop hiring dentists (A. 299-300, 442-446).

At about this time in early March a meeting was held with agents of the Union that represented all clerical employees of the Joint Industry Board, including the assistants in the Dental and Medical Departments. The meeting was held to consider a request made under the terms of an existing collective bargaining agreement to have various positions reevaluated and upgraded. The Union was advised that the financial condition of the Pension Committee made it impossible to grant the request, since any upgrading would cost money that the Pension Committee did not have. This message was communicated to Medical and Dental Assistants at one

shop meeting and to the other clericals at another meeting (A. 350, 357-359).

On April 23, 1976 the Assistant Director of Administration reported to the Chairman of the Joint Industry Board that, in his opinion formed after two months of research, the proposed program of direct payment to hospitals was feasible and would effect savings of 20% of the substantial outlay for hospitalization, major medical and related benefits. Projected savings were \$1 million (A. 333-334, 391-392, 569).

4) At the April 28th meeting of the Board of Trustees of the Pension Committee the following took place:

The report of October, 1975 relative to benefits of other plans in the construction industry was sought to be updated, but the only report possible was that all the other funds surveyed had "gone underground" by not cooperating with the survey, leaving the Trustees to place their own construction upon the ominous sounds of silence coming from those other funds (A. 325).

After listening to the financial report presented at the April meeting and noting that the progression of losses was continuing at a very rapid rate, which if allowed to go unabated would deplete the fund balance rather quickly, the Chairman of the Board of Trustees of the Pension Committee instructed the Chairman of the Joint Industry Board, the chief administrator of the various benefit plans, to take whatever actions were necessary to diminish the losses and to preserve to the extent possible the remaining fund balance (A. 332, 409, 417).

C] The events pertaining to the shutdown of the Dental Department:

The following day, April 29, 1976, the Chairman of the Joint Industry Board met with the Director of Administration of the Pension Committee to take immediate action. They determined to close down the Dental Department forthwith and thereby save its anticipated expense of \$1 million per year (A. 349, 399-402).

Later in the afternoon of that same day, the Director of Administration delivered the news to the Assistant Director, the Director of the Dental Department and Union representatives of the 100-or-so clericals employed by the Joint Industry Board (A. 349-350, 415).

The following day the Director of Administration and the Assistant Director held a meeting with all the dental assistants (both shifts at one meeting) at 9 a.m. Their Union representatives were present. The closing was announced together with the economic reasons for the closing. In the question period that followed one dental assistant asked whether the activities that the dentists had been engaged in played a role in the decision. She was answered that such was definitely not the case, and that severe economic considerations alone made the closing imperative. Subsequently the Medical Assistants were given the same message in terms equally as forceful. When the dentists arrived for their late morning shift, they were advised of the closing (A. 351-352, 354-355).

The Director of Administration of the Pension Committee and the Assistant Director then took turns supervising the cancellation of appointments by the dental assistants over the telephone.

One or the other of them remained on the premises to answer any inquiries made in person or by phone as to the reasons for the closing. Those patients who were not advised of the closing by telephone were mailed notice to that effect (A. 348, 352-353).

The following day the Director of the Dental Department, himself a dentist of long experience, charted the projected treatment of patients in the prosthetics and crown-and-bridge departments to determine the order of treatment of those relatively few patients who had been appointed to receive dental appliances. The appliances themselves were in varying stages of completion. After determining the work schedule, it was determined that the Director of the Dental Department would have no trouble completing work on these patients well within the time left on his employment contract (A. 314, 336-338, 347-348).

The economic reasons for the closing were communicated to the general membership at a meeting two weeks later (A. 330, Appellee's Exhibit 14, p. 2). Subsequently a notice explaining the closing was prepared for publication in the newspaper of Local Union No. 3, IBEW, and read at a membership meeting (A. 331, Appellee's Exhibit 15, pp. 3-4, 374-375).

After the close of the hearing before the Administrative Law Judge, it was formally announced that local building trades unions, including Local Union No. 3, IBEW, had agreed to take a 25% cut in wages for certain restoration work, a measure

necessitated by the employment situation in the industry (A. 19-
20). ^{1/}

-
1. The Labor Board thinks that it can show the Pension Committee's bad faith by pointing out that only the dental benefit was cut back. The contention is blind to the entire purpose of the shutdown of the Dental Department, which was to save money. If the Pension Committee could save another \$1,000,000 by drastically changing its traditional payment procedures, and thereby prolong its ability to sit out the storm for an appreciably longer period, it naturally would pursue that course and avoid the need, at least for the time being, for depriving participants of still other benefits.

As to other economy measures, the reduction in vacation benefits by another plan administered by the Joint Industry Board was felt by most participants more keenly than the elimination of the dental benefit, and was taken by all participants as a serious matter. Unlike the dental benefit, vacation pay is not considered to be a "fringe benefit" utilized by some participants, but rather as cash in the bank to everyone.

The 25% reduction in pay on certain jobs goes to the heart of the financial status of participants, and is more of a commentary upon and reflection of hard economic times than a reduction in employee benefits.

D] The basis of the Pension Committee's decision to shut down the Dental Department:

The Director of Administration of the Pension Committee, Joseph D'Angelo, testified at length as to why it was the Dental Department that was chosen for elimination.

The Dental Department had been providing service that, because of the increase in caseload, was felt by its management to be inadequate (A. 344). Whether the congestion in the Department manifested itself in appointment cycles of three weeks (A. 143), or five weeks (A. 193, 212), the situation was a far cry from the pre-economic-slump days when ten-day waiting periods were the norm (A. 299). The backlog kept growing, but the Pension Committee could not even afford to pay for the service offered in other, less troubled times. Further expenditures were out of the question, and yet only by spending more money could the Dental Department remain static in terms of its effectiveness as a benefit. Meanwhile the Medical Department's scheduling had not been affected to any comparable extent (A. 349).

Mr. D'Angelo bluntly stated his perception of the value placed upon the Medical Department relative to the value of the Dental Department. It was that the Medical Department provided a superior health service (A. 339). The Medical Department diagnosed and ran tests on any participant with any health problem (A. 428). The objects of its concern were often diseases that would be fatal unless detected at an early stage. The

Dental Department was concerned solely with the health of the mouth. In addition many participants found it uninviting to travel considerable distances to have their mouths treated or teeth extracted at the clinic, a factor ignored by those who required the services of the Medical Department. As a consequence, there had recently been repeated proposals by negotiators for Local Union No. 3 that the dental benefit be recast in a form other than a clinic located at Pension Committee headquarters (A. 345).

Other benefits were less amenable to cutbacks than the dental benefit. The optical benefit was provided as part of the medical benefit, and used the same clerical personnel and physical space as the Medical Department. Eliminating the optical benefit, which consumed one-fifth of the resources used by the Dental Department, would have meant giving up the "free" overflow of services from the Medical Department, reducing efficiency at a time when the Administrators were eager to stretch the dollar. Equally as important, \$70,000 of the Optical Department's expenses was compensation for ophthalmologists. In effect this made the Optical Department another "pocket" for the Medical Department, which would not have been adequately staffed without those ophthalmologists (A. 340-344, 562).

The elimination of the rest home-convalescence facility would have been, from a plan administrator's viewpoint, an act of utter waste. It cost little more to keep the facility open than to shut it down, in view of its great proportion of fixed expenses. Furthermore, the cost of services provided by the

facility would, if it had been eliminated, simply have been passed on to the hospitalization benefit (A. 429, 561).

The hospitalization-major medical benefit was not touched because any reduction would have necessitated the purchase of supplementary health insurance by participants at a time they could least afford it (A. 339-340, 389).

E] Significant misstatements appear in the Labor Board's Statement of Facts:

The Labor Board's description, in its brief at page 10, of the processes that led to the shutdown of the Dental Department ranges from a distortion of the facts to an outright misreading of the record.

The Dental Department was shut down following the Pension Committee's Board meeting of April 28, 1976 not because of "a general direction...to take steps to reduce the Joint Board's operating deficit", but because the Administrators were given to understand succinctly and bluntly that they were to take "all actions, whatever actions [were] necessary to protect the balance and reduce the deficit" of the Pension Committee account. The Chairman of the Board of the Pension Committee then "turned to the Chairman of the Joint Board, who sits next to him and said, would you do that and report back to the board..." (A. 418-419).

That may seem like a "general direction" to the Labor Board, but to plan administrators of long experience it is a mandate that they show at the next meeting of the Board results in the form of specific, tangible, visible and substantial savings.

The background of the April directive was the ballooning losses that were reported at the previous October, December and February meetings. By April 28, following the most calamitous report to that point, there was no need (or patience) for protracted discussion among Employer Trustees who had long been suffering steep declines in their corporate revenues and Union Trustees who had been living with an epidemic of unemployment. For two solid months, the Administrators had been studying the possibility of benefit reductions pursuant to their promise to the Trustees at the February meeting (supra). The decision that they made the day following the April meeting was hardly the incongruous and suspect product of "a general direction" to keep the overhead down.^{2/}

-
2. The Labor Board correctly notes that the official minutes of the April meeting do not contain reference to the directive given to the Administrators. The minutes, however, are not professionally done and they follow an unvarying mechanical form for the part of the Board meeting in which financial reports are made, and discussion of those reports is held. If the Labor Board's argument based on the minutes were credited, it would mean that there was no serious discussion at any of the Pension Committee's meetings about the financial reports, a result so contradictory of the unrebutted testimony and itself so unlikely that it permits only the conclusion that the minutes may not be relied on by the Labor Board for its purposes. See A. 539-540 and General Counsel's Exhibit 13 at the hearing before the Administrative Law Judge (not in Joint Appendix).

The statement of the Labor Board in its brief (at page 10) that "[T]he abrupt decision to close the dental clinic was made without conducting a study as to the amount which would be saved by closing the dental clinic and without any determination as to how to proceed with the processing and treating of current patients"(A. 400, 402, 413-415) is false.

At A. 400, the attorney for the Labor Board asked about studies relative to the "reduction" of benefits, a term explained in his earlier question at A. 399: "...[W]as it also considered that as an alternative, you might have been able to eliminate some of the dental coverage, rather than eliminate the Clinic, itself?" The answer from Mr. D'Angelo was "Yes", and he explained that half-way coverage was considered but rejected for a number of reasons. He then responded that an "in depth study on paper" was not made of what the financial effects would be of "half-way coverage" situations such as "if we [were to] discontinue the spouses" from coverage (A. 400).

The Labor Board's citation to A. 402 should have disabused it of the extremely prejudicial thinking that a study had not been made of how much would be saved by closing the Dental Department: Mr. D'Angelo testified that, with costs rising as they were, the savings from this one measure alone would be \$1 million of a total projected deficit of \$5 million. Contrary to the Labor Board's assertion, the process of determining the economic and human effects of eliminating or reducing one benefit or another was the subject of at least two months of daily

study, a substantial part of which preceded notification of the union's organizing drive. See supra.

Similarly the "processing and treating of current patients" was the product of a most thorough determination by the Administrators. It was known that work would be completed only upon "those patients in [the] crown and bridge or prosthetics [sections of the Dental Department] where appliances were in the process of being manufactured". The Administrators had a solid basis for knowing, and did know, how many patients were in these categories and what the overall status of their treatment was, as a group. (A. 307-308, 314, 337-338, 348, 413)

Mr. D'Angelo's testimony that there was some open-endedness as to the "order" and "manner" of their treatment should be taken with his other responsible remarks about the susceptibility of any of the Administrators' decisions to "feedback", and the willingness of the Administrators to make any necessary adjustments. It was known, however, that at least one dentist would remain on the payroll (at no additional cost to the Pension Committee) and that he could best determine the details of the close-out treatment on the limited group within a day or two following the shutdown, which is what that dentist did (Ibid).

To state, as the Labor Board has stated, that the closing of the Department was made "without any determination as to how to proceed" may give the impression of "abruptness"

that serves the Labor Board's purposes, but it is very far from being the truth.

The contention of "abruptness" in the closing should also be weighed against the lapse of a month-and-a-half from the time the Pension Committee learned of the Union organizing drive to the time of the shutdown. If there was any "abruptness" at all, its cause could not have been that organizing drive, but would have been the traumatic Board meeting of the previous evening, with its directive that decisive action be taken swiftly.

F] The unfounded allegations of antiunion animus on the part of the Pension Committee:

The evidence used by the Labor Board to build a case of antiunion animus on the part of the Pension Committee is as weak as can be imagined.

Dr. Sidney Krauss was the director of the Dental Department. His only concern was the implementation of professional standards for the dentists and the supervision of their professional work and conduct; he would also be called upon by the Administrators when they determined whether individual dentists would receive raises (A. 366-370, 436).

As indicated above, in October, 1975 Dr. Krauss was the conduit of the information that no dentist would receive a raise due to the poor financial condition of the Pension Committee. The dentists thereupon sought out a Union, both to obtain

raises and for protection against what they considered a tyrannical and professionally demeaning Dr. Krauss (A. 159, 241-243, 248-249, 436-439, 491-492).

When Dr. Krauss received the telegram in which the Union claimed majority status, he admits that he was hurt. He recognized that the organizing drive thrived on a certain personal unpopularity of his among more than a few dentists, and he also felt "accused" for not having come down from the Administrator's office with raises in hand (A. 185-186, 473-474, 491-492).

There followed some few private expressions of Dr. Krauss' wounded feelings which the Labor Board, bent on proving that this was why the Administrators of the Pension Committee shut down the Dental Department, magnifies inordinately to make appear menacing. Whether violations or not, their link to the shutdown has yet to be explained.

When Dr. Krauss received the telegram demanding recognition, he brought it up to the Administrators' office. On the way he met an old friend and confidant, and, slightly confused by developments, blurted, "Do you fellows know anything about this?". He then quickly said, "Oh forget it, never mind" (A. 558-559). According to the dentist spoken to, Dr. Krauss had never given any reason to believe that he was anti-union, but the dentist was nonetheless reluctant, for personal reasons, to tell what he knew (A. 121-124).

Another "interrogation" was made of Dr. Sidney Calem, a longtime friend of Dr. Krauss, with whom he frequently

consulted professionally. Dr. Calem testified: "And while we were discussing that [a dental matter], [Dr. Krauss] happened to say to me, 'By the way, are you one of the men that signed with the union?' And I said, 'No, I am not.' And that ended it." (A. 183).

Dr. Alcalay bumped into Dr. Krauss in the hall between an operatory and the waiting room and Dr. Krauss asked him, "Hey Yussella, you too, are you involved?" Dr. Alcalay answered on the run in the manner of one "kidding around", saying that he was "involved with my wife, and my patients and my kids, my nurse." That concluded the final "interrogation". (A. 99-100, 493).

The incident involving Dr. Manford did not, as the Labor Board reports, result from the dental lab's mistake in losing a partial denture. Dr. Krauss explained that Dr. Manford had taken an impression of a patient's mouth without the partial denture in place, making the results wholly useless (A. 471-472). Dr. Calem remembered that after Dr. Krauss called in himself and Dr. Goldberg, Dr. Krauss "asked us what would you do to this man or how would you treat the situation if you were the director?" (A. 184) When Dr. Manford was finally called into the Director's office, Dr. Krauss asked him, "Jules, are you trying to provide [should be "provoke"] me into firing you?" (A. 472). Dr. Calem's perception of Dr. Krauss' position on Dr. Manford's dereliction was: "Well, I guess the impression that Dr. Krauss felt that this was such a basic thing, and that

a man who had a lot of years experience should not have made that mistake. And therefore, if he made the mistake, he felt that it might have been deliberate." (A. 184-185).

The subject of the Union came up when Dr. Goldberg brought up the subject, saying that the dentists were not out for Dr. Krauss' job and that Dr. Krauss had been a good administrator. Dr. Krauss replied that "a lot of the men dislike me or dislike my manner and my way of talking, etc., etc." (A. 186). Dr. Krauss continued, "I'm going to have to thank you for this, too. Because there's going to be a certification election here, and if you gentlemen certify any organization to represent you, it means you're off my back, I don't have to have a damn thing to do with your welfare and with you". (A. 473-474).

In the context of Dr. Krauss complaining that he felt foolish not knowing about what was happening in his own Department, he supposedly asked how come Dr. Calem had not told him that the dentists were organizing. Dr. Krauss, however, did not pursue the point. Dr. Calem also recalled that, after exchanging viewpoints about what discipline, if any, should be imposed on Dr. Manford, Dr. Krauss said that "everything was out of his hands" and in the hands of "D'Angelo and Local 3". Dr. Krauss' version of what he said, was more explanatory: "I had never been stripped of my powers by anyone, I do recall at the end of the conversation in my office, relative to Dr. Manford and Dr. Goldberg telling me what he did, I said to him, you know, I'm

out of this thing, I have no authority in it, there's nothing I can do about it one way or the other." (A. 188-189, 594-595).

The "closer supervision" attributed to Dr. Krauss during the pre-election period was refuted both by Dr. Krauss and the staunchest of witnesses for the Labor Board (A. 98, 161-162, 167-169, 248-249, 457-458, 461, 475-477).

The Labor Board's rebuttal took the form of a professional disagreement between Dr. Krauss and Dr. Eiges, who nevertheless agreed that Dr. Krauss had always examined patients on an intermittent basis as they were leaving the clinic (A. 229); and of an isolated report by Dr. Vierno that he had never before been reprimanded for letting a patient go before the full appointment time had been used (A. 211); and of an overheard remark by a dentist who did not testify, to the effect that Dr. Krauss was checking the records more carefully these days.

Dr. Krauss did have occasion to meet twice with his assembled dentists during the pre-election period. One such occasion came after Dr. Vierno threw the clinic into confusion by telling patients that the clinic would close. According to Dr. Nesse, the Labor Board's chief protagonist, Dr. Krauss warned against spreading rumors because "the only one who could close the clinic would be the Joint Board" (A. 146). Dr. Vierno, the dentist who was reprimanded for spreading the rumor, heard Dr. Krauss say that "[t]his business about rumors of the clinic

closing would have to stop because if he received any information about the clinic closing it would come from upstairs. And then we would be told. And if anybody started any rumors after that they would be treated summarily" (A. 205-207, 452-453).

At the next group meeting, Dr. Krauss, who had come across various acts of malpractice, some of them extreme, told the dentists that "it wasn't fair to the patients, that such a thing all of a sudden should be happening" (A.219). (This was the testimony of Dr. Warren, one of the Labor Board's principal witnesses against Dr. Krauss. His recollection, which had been found to be remarkably accurate [cf A. 218 with A. 570] did not include a reference to "sabotage".)

Mr. D'Angelo's address to the dentists (A. 570) came after he had been given reports about a feeling among some dentists that the rules no longer applied, after he had been advised of the scene in the clinic caused by Dr. Vierno, after hearing from the dental assistants that the patients were being fed rumors of closing, after he had been personally visited by patients telling him that some dentists were lobbying for their support as Union members, and after being advised of a possible slowdown, or work-extending practices, in the Dental Department (A. 370-372, 459-460).

His statement was limited to an abuse of the dentist-patient relationship as a bargaining ploy; it expressed no

opinion about anything else.

The opinions expressed by Dr. Krauss to Dr. Corliss after the shutdown of the Dental Department were made in conversations initiated by Dr. Corliss and in response to questions by Dr. Corliss; were between old friends; concerned, in the main, fishing; were predicated on the assumption that the election would take place and, if the Union were victorious, that bargaining would follow; and were understood by Dr. Corliss for what Dr. Krauss said they were -- his own opinions and predictions, accompanied by disclaimers of knowledge of how the Administrators were thinking (A. 88-91, 93-94).

It was made clear by Mr. D'Angelo, Dr. Krauss and all the dentists who testified on the point that Dr. Krauss had absolutely no say in whether the Dental Department would shut down or remain open. In fact, he was not consulted at all except on the progress of work in the Department (A. 336, 370).

ARGUMENT

I

NO 10(j) INJUNCTION HAS EVER ALTERED THE
FINANCIAL STATUS OF THE PARTIES; HERE THE
LABOR BOARD IS DEMANDING THAT THE PENSION
COMMITTEE LOSE \$1 MILLION A YEAR PRIOR TO
ANY ADJUDICATION

The Labor Board has not cited a single case in which a court has ordered, as preliminary relief under Section 10(j) of the Act, that an Employer reopen after it shut down in whole or in part.

It has not cited an instance in which relief under Section 10(j) has involved the expenditure or loss of money, however de minimis, to any party.

A review of the cases cited by the Labor Board at page 27 of its brief leads to no different conclusion.

In Angle v. Sacks, 382 F.2d 655 (10th Cir., 1967), six discharged employees benefited from a reinstatement order. The employer raised a Constitutional objection, but not an economic one, to this portion of the relief; furthermore, the employer had doubled its staff since the time of the discharges, which may explain why neither the district court nor Court of Appeals mentioned the need to displace current employees as a result of reinstating the employees discharged.

Even if newly hired employees would have had to be let go to make room for the reinstated employees, it would not have

been the employer who suffered economic loss.

This last factor applies with equal force to the reinstatement order in Smith v. Old Angus, Inc., 81 LRRM 2936 (D., Md., 1972), with the addition of the statement by the court that "[t]he evidence does not support the contention that any employees were discharged for cause". Id., at 2942. The lengthy opinion of the district court establishes that, regardless of the 10(j) posture of the proceeding, the court did not consider it possible for the employer to prevail in the plenary adjudication of the Labor Board or in any judicial review thereafter. Under those circumstances, the court refused to withhold the unusual remedy of immediate reinstatement, especially since it was not contended that the employer would sustain economic loss thereby.

Davis v. R. G. LeTourneau, Inc., 340 F.Supp. 882 (E.D., Tex., 1971) cited by the Labor Board for the proposition that reinstatement has been granted as part of 10(j) relief, illustrates well why ordering the reopening of the Dental Department and the reinstatement of thirty dentists and seventeen dental assistants would be as unprecedented as it would be inequitable.

In LeTourneau, the district court justified the unusual reinstatement provision in its order by stating: "The respondent [employer], on the other hand, is very little inconvenienced by an order requiring it to reinstate a handful of employees to its

2,000 man working force and requiring respondent to refrain from violating the law in regard to surveillance, interrogation, and intimidation of employees concerning their union activities. [Citation omitted.]" 340 F. Supp. at 884.

In the case at bar, a reopening-reinstatement order would lower the Pension Committee's reserves by \$1 million a year, and possibly sink the entire employee welfare benefit plan.

Reynolds v. Curley Printing Co., Inc., 247 F.Supp. 317 (M. D. Tenn., 1965) takes a similar approach, the district court finding that "the hardship that compelling reinstatement may cause respondent...is outweighed in this case" by evidence that the employer had "repeatedly warned the employees that unionization would impair their job security". 247 F. Supp. at 323.

As in Smith v. Old Angus, Inc., supra, the district court considered the "clarity of the evidence" against the employer as a factor in ordering reinstatement (see footnote "3" in Curley Printing), and adverted to the employer's "pattern of activity in flagrant violation of the provisions of the Act". Id., at 323.

While in Potter v. United Foods, Inc., 58 LRRM 2469 (S.D. Tex., 1965) the district court's brief findings provide no explanation for granting the special relief, Elliott v. Dubois Chemicals, Inc., 201 F. Supp. 1 (N.D. Tex., 1961) notes that "the number of men employed varied from time to time",

and prohibited future lay-offs and discharges only "if such termination is for the purpose of discouraging membership in a union". 201 F. Supp. at 3. See also 49 LRRM 2238, 2339.

In contrast, the case upon which the Labor Board pins its hopes in bringing this appeal unequivocally rejected, (in its district court stage), the concept of changing the financial condition of the Respondent in a 10(j) proceeding.

The district court in Seeler v. Trading Port, Inc., 88 LRRM 3293, (N.D., N.Y., 1974), wrote:

"The record before the examiner shows, as is so often the case, that during the strike some of the Employer's customers went elsewhere. The strike coincided in time with an increase in the costs of truck rental because of the energy shortage, and the Employer, either because of the strike or simultaneously with the strike, terminated certain delivery services which it had given some of its customers, withdrew from highly competitive, low-profit or non-profit areas of its business activity, and contracted the scope of its dealings. In part, this was voluntary, because the shutdown together with the threatened increase in the truck rentals had shown the respondent that parts of its business operation were unprofitable without regard to the strike. In part, this contraction of business was involuntary, because of customers lost as a result of the strike. The proof is adequate the following the astrike, and even at the time of the hearings, the respondent did not need additional employees in its warehousing operation.

It would be inappropriate under the circumstances for this Court to compel the rehiring of unnecessary workers. It would also seem inequitable at this stage of the proceedings, in effect to order the Employer to fire employees who have been working since the strike, to rehire those of greater seniority who have not been working, or have been working elsewhere

since October of 1973. This would be unduly disruptive to the conduct of the business, and to the lives of those who would have to be discharged. It would be an improvident exercise of judicial power while there remains at issue before the Administrative Law Judge the question of whether or not The Trading Port, prior to the strike, used seniority as a basis for the recall of workers when temporary layoffs took place due to insufficient work.

Of course, it remains possible, after a determination on the merits, that the Board might make such a direction, and in dealing with the Section 8(a)3 claim, may also direct a full award of back pay to any who were discriminated against when the rehiring occurred."

88 LRRM at 3297-3298.

Still other cases have been decided by reference to guidelines more nearly applicable to the instant case on appeal.

In Johansen v. Queen Mary Restaurants, 86 LRRM 2813, 2814 (C. D. Cal., 1974), the district court stated:

"The Petitioner also prays that the court order the respondent to reinstate those employees that went on strike. Here again, the requested relief is drastic and is sought in advance of any adjudication that the respondent is guilty of an unfair labor practice. If such adjudication later occurs, the strikers desiring to return to their employment may do so, and may claim back pay. If the respondent has not committed an unfair labor practice, to require now such reinstatement would be unfair to the respondent and to the current employees that would have to be discharged in order to make positions available for the strikers."

See also Johnston v. Mackney & Sons, Inc., 71 LRRM 2618, 2622 (E.D., N.C., 1969):

"Of the 41 employees who were discharged, all but two are gainfully employed. If Respondent were ordered to reinstate all 41 of the employees pending the Board's decision, there would exist the possibility that the employees would again be dismissed if the Board should determine that the original discharge was economically motivated. Since Respondent has not replaced the 41 who were discharged, there would appear to be a strong likelihood that the Board may find that the discharges were motivated by economic considerations."

When compared to any of the foregoing cases, whether cited by the Labor Board or the Pension Committee, the lower court's exercise of discretion is all the more readily understandable.

Reopening of the closed Dental Department would involve the outflow of \$1,000,000 a year over a period of more than a year. Annual contributions from Employers in the depressed electrical contracting industry have long since ceased to support annual expenses. If the Labor Board should prevail in its request for immediate reopening and the Board, in its adjudicatory capacity, and the Courts ultimately rule in favor of the Pension Committee, the employer herein will have suffered serious financial loss without hope of reimbursement. By continuing to lose money in massive doses, it might also have lost the time it hoped to "buy" by taking measures to save \$2 million annually, measures that included the closing of the Dental Department.

Contrary to the Labor Board's contention at p. 17 of its Brief, traditional equity considerations were not "specifically

rejected by Congress as elements in petitions for injunctive relief under Section 10(j) and (1)". The great loss that would accompany a reopening and reinstatement order were therefore properly weighed by the district court herein.

See Hecht Co. v. Bowles, 321 U.S. 321, 329-330 (1944) on the standards applicable to statutory injunctions:

"A grant of jurisdiction [emphasis in original] to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made.... We are dealing here with the requirements of equity practice with a background of several hundred years of history....The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case."

The Court proceeded to state that traditional equity considerations should be "conditioned by the necessities of the public interest which Congress has sought to protect".

In accord are:

Danielson v. Joint Board of Coat, Suit & Allied Garment Workers' Union, 494 F. 2d 1230 (2nd Cir., 1974);

McLeod v. General Electric Co., 366 F.2d 847 (2nd Cir., 1966), vacated as moot, 385 U.S. 533 (1967);

Boire v. Pilot Freight Carriers, Inc., 515 F. 2d 1185 (5th Cir., 1975);

Johnston v. Hackney & Sons, Inc., supra.

I.

THE STANDARD APPLIED TO FIND
"REASONABLE CAUSE" IN THIS
CASE WILL NOT SUPPORT THE
DRASTIC RELIEF REQUESTED.

The district court decided this case by making a determination of whether the relief requested by the Board was "just and proper", and, if not, what relief was.

It recognized that before it could grant the relief that it did, some finding of "reasonable cause" had to be made and the Judge made clear upon the record that he was applying the following standard:

"THE COURT: Well, I can tell you based on what I hear and based on an assumption that the record will support what you [the attorney for the Labor Board] said as a possible finding, I don't have to make the finding that the Hearing Examiner would make. You understand all I have to do is say there is a basis for such a belief." (A. 28-29)

The hearing consisted of twenty pages of transcript and lasted approximately fifteen minutes. The 600-page transcript of the hearing held before the Administrative Law Judge of the Labor Board was not read. The District Court Judge had examined the Labor Board's Petition for 10(j) relief that was filed earlier in the day and on that basis granted relief to the extent that he did (A. 17-18).

The Pension Committee does not maintain that the standard of "reasonable cause" was misapplied. The standard is so attenuated, with the Labor Board "given the benefit of the doubt in a proceeding for §10(j) relief" (Seeler v.

Trading Port, 517 F. 2d. 33, 36-37 [2nd Cir., 1975]), that the Pension Committee does not seek to litigate whether a case involving a shutdown by an employer in the pre-election period can possibly escape an adverse preliminary finding based on criteria normally applied in Section 10(j) proceedings.

See, for example, the finding relative to action taken by the employer in Reynolds v. Curley Printing Co., Inc., supra:

"Respondent's officers testified that the shift changes were motivated by reports of drinking on the night shift, the need to place the best workers on the night shift because of lack of supervision at night, and the prospect of discontinuing the night shift. Whether these reasons actually motivated the shift change is an issue exclusively within the Board's determination. This court finds that the proximity in time of the shift change to the election, the fact that the change was instituted unilaterally without notice to the union, the lack of precedent for the change in the Company's history, and the employee hardship which respondent had reason to know would result, constitute reasonable cause to believe that the shift change was instituted as a reprisal against the employees and as an attempt to undermine the union's support." 247 F. Supp. at 319.

While the "suspicious timing" aspect of a change in operations or a shutdown does not satisfy the burden of proof shouldered by the General Counsel of the Labor Board in a Board adjudication, (See, e.g., Wagoner Water Heater Co., Inc., 203 NLRB No. 84 [1973]; Thompson Transport Co., 165 NLRB No. 96 [1967]; McLoughlin Mfg. Corp., 164 NLRB No. 23 [1967])

the Respondent in a 10(j) proceeding has reason to be pessimistic when the Board is given the benefit of all doubts under the circumstances of a pre-election shutdown.

Nevertheless a higher standard should control the issuance of an injunction which would compel an employer to reopen an enterprise that is losing \$1 million a year and to bargain with the purported representative of persons whom the employer does not consider to be its employees. The relief sought is drastic, and it would offend the principles of equity to grant it when the standard applied was, in a realistic sense, applied automatically.

In Seeler v. Trading Port, Inc., supra, this Court remanded the case to the district court to determine whether the unfair labor practices were so "egregious," "coercive," and "so serious as to warrant the issuance of an interim bargaining order." The district court judge was further directed to give weight to the findings of violations that had already been made by the Administrative Law Judge of the Labor Board. 517 F. 2d at 40, and at fn. "11."

The terms of the remand distinguish the decision of this Court from the Fifth Circuit's decision in Boire v. Pilot Freight Carriers, Inc., supra. For the district court to have granted the interim bargaining order, it would have had to find a violation with considerably greater certainty than is normally required under the "reasonable cause" standard.

Although the Pension Committee submits that the extreme relief sought by the Labor Board may not be granted

in a 10(j) proceeding, it is urged that the relief requested, in whole or in part, would be particularly inappropriate in the posture of this case and on the basis of the minimal standard that was applied in the district court.

III

THE DENTAL DEPARTMENT SHOULD NOT BE ORDERED TO
REOPEN TO GIVE MEANING TO A BARGAINING ORDER,
PARTICULARLY SINCE ANY ORDER TO REOPEN WOULD BE
CONTRARY TO PRECEDENT

The Labor Board seeks two distinct forms of relief:
a bargaining order and an order requiring the Pension Committee
to reopen the Dental Department.

According to the Labor Board, the bargaining order
is requested so that the purposes of the Act may not be
frustrated.

The reopening is requested so that the bargaining order
(both the interim one demanded and the ultimate one predicted)
may not be frustrated (Labor Board brief, at p. 26).

The request that a party expend \$1 million a year
without reimbursement in order to give effect to a bargaining
order granted prior to a first-level adjudication of the merits
of the dispute is without precedent, and should be the limiting
case of the tail being asked to wag the dog. It is also so
transparently inequitable that the irony is that the request
should be made in the course of invoking the Court's equitable
powers.

The precedent cited by the Labor Board suggests the
spectre of this Court issuing a bargaining order pursuant to
Seeler v. Trading Port, Inc., *supra*, which involved a continuously
existing employer, and then ordering the Pension Committee to be
drained of \$1 million a year in order to make the interim bargaining

order something other than a nullity. Even if there were a basis for a bargaining order, as there is not, it would be traveling well beyond the realm of this Court's decision in Trading Port to grant the "incidental" relief requested.

Far from affirming precedent, the effect of a reopening order in this case upon principles of federal labor law established over a long course of careful administrative and judicial analysis would be to initiate a course contrary to all precedent.

It has long been the law that an employer may shut down in whole or in part at any time for economic reasons. NLRB v. Burns Int'l. Detective Agency, Inc., 364 F. 2d 897 (8th Cir., 1965); Mount Hope Finishing Co., Inc. v. NLRB, 211 F. 2d 365 (4th Cir., 1954); Cumberland Shoe Corp., 156 NLRB No. 103 (1966); Elm Hill Meats of Owensboro, 213 NLRB No. 100 (1974). ("In the absence of a finding that Respondent closed its Owensboro plant for discriminatory reasons, the Board would be powerless, as the dissenters well know, to do anything but require Respondent to bargain in good faith about such peripheral matters as terminal pay. The Board cannot require an employer to reinstate an operation or reinstate employees dismissed as a result of a lawful decision to close a plant.") On a shutdown similar in extent to the one in this case, the Board has applied a still more permissive standard, requiring the General Counsel of the Board to prove that the

shutdown, even if undoubtedly effected to avoid bargaining, was intended to chill union activity in the parts of the employer's operations which survive the partial shutdown. George Lithograph Company, 204 NLRB No. 50 (1973), citing Textile Workers, TWUA v. Darlington Mfg. Co., 389 U.S. 263 (1965). However, the Labor Board now asks this Court to overrule these principles and require any Employer who shuts down in whole or in part during a union organizing drive or for reasons thought suspect under other circumstances to reopen pending the final determination of the charges against it. With "preliminary" relief of such massive impact (completely undercutting the employer's asserted economic reasons for shutting down when it did) the protected right to shut down loses all meaning.

The only safeguard for the Employer would be the hope that the district court would find that reasonable cause did not exist to believe that the shutdown was for antiunion reasons. The possibility of such a finding when an employer shuts down during an organizational drive is almost nonexistent, for reasons set forth above. In the lower court proceedings herein, the hearing took all of fifteen minutes, most of which was consumed by supplementary testimony by the Pension Committee, even though the Judge accepted the defense of great economic losses. That should serve to indicate the widespread effect, entirely contradictory of the purposes of the law as it has developed in this area, that a reopening order in this case would have.

IV

A BARGAINING ORDER HEREIN WOULD BE EMPTY,
PREJUDICIAL AND COERCIVE.

The Labor Board has no valid reason to persist in seeking a bargaining order against the Pension Committee once its request for a reopening order is denied.

As the Labor Board concedes in its brief, at p. 26: "Any negotiations occurring while the clinic remains closed and the dentists unemployed obviously would be of precious little value either to the dentists or the Union. At best, the Union would be limited to bargaining for the reopening of the clinic and reinstatement of the dentists. And, in such negotiations, the Union would have virtually no leverage."

The concession does not go far enough.

Regardless of leverage (of course "employees" have none when their erstwhile employer has gone out of business, and will have been out of business for three-quarters of a year before this Court may be expected to rule) the Pension Committee shut down the Dental Department not because it felt that the dentists or dental assistants were being paid wages that were disproportionately high, but because a massive cut had to be made somewhere and the Dental Department was the likeliest candidate. Since wages and other terms and conditions of employment were not instrumental in the closing, there would be "precious little value" indeed in engaging in the bargaining process under

the careful and exacting eye of the Labor Board. Instead of something of value, pointless litigation would probably ensue.

Similar considerations of futility may have shaped the prevailing rule that an employer need not bargain about its economic decision to shut down or change its structure in a fundamental way. NLRB v. Adams Dairy, Inc., 350 F. 2d 108 (8th Cir., 1965), following remand in 379 U.S. 644 (1965); Elm Hill Meats of Owensboro, Inc., supra.

It was in reliance upon this rule, and its logic, that the Pension Committee did not formally bargain with the Union that represented the dental assistants who worked in the Dental Department about the decision to shut down, except to notify that Union's representative promptly of all pertinent developments. Not one of the those dental assistants complained of the legality of the shutdown (although the Labor Board presumptuously listed them in the Complaint together with the dentists), and the Union that represented those dental assistants did not see any ground to protest either the shutdown of the Department or the absence of "bargaining" about the decision to shut down. The Administrative Law Judge of the Labor Board himself recognized that if the Department were shut down for economic reasons, the remainder of the Board's case would fall away too (Transcript of hearing before Administrative Law Judge, pp. 29-30; and A. 201-202).

The Labor Board apparently maintains that the district court's pro forma finding of "reasonable cause" under the 10(j) standard erases the employer's right to maintain that its shutdown was economic in origin. The contention is without a basis. If the Pension Committee should be ordered to bargain with the labor organization that collected authorization cards among the dentists as though it had already been decided that the shutdown was unlawful, the Pension Committee would be fatally prejudiced, and there would remain no further bargaining issue for the Board to decide.

See Johansen v. Queen Mary Restaurants, supra:

"...[T]he matters of union security and hiring hall are the only substantial issues remaining in the 'negotiations'. If this court were to order that the respondent bargain in good faith, the compelling inference would be that compliance with such order would require the respondent to concede these remaining issues. This would be unfair to the respondent in the absence of a prior adjudication that its previous refusal to 'give in' has been in bad faith. No such adjudication has been made."

86 LRRM at 2814.

"To impose a duty of good faith collective bargaining implies the making of a valid labor agreement."

Kaynard v. Lawrence Rigging, Inc.,
80 LRRM 2600 at 2605 (E.D., N.Y., 1972)

"...[I]n the absence of such recognition [by the parties of an initial duty to confer with each other] their meeting would be unlikely to be productive unless a court acts...to provide what is in effect a ruling on the merits, or at least such a strong indication that it would be reasonable to anticipate that the losing party would abandon its previous resistance."

United Auto Workers v. NLRB,
449 F. 2d 1046, at 1052.
(D. C. Cir., 1971)

In the instant case as well, a bargaining order that directs, whether expressly or as an unavoidable consequence, that bargaining take place on a specific subject would compel the Pension Committee to concede that its closing was not economically motivated -- which is the very issue that the Pension Committee has litigated tenaciously before the Labor Board and which has yet to be adjudicated.

The effect of granting the Labor Board's request for a bargaining order would extend beyond this case and substantially defeat the rule that permits an employer to change its operations without first engaging in collective bargaining with a union that represents its employees. This follows because the Board's position as to when an interim bargaining order is "just and proper" relief would not distinguish between a shutdown occurring in the course of a union organizing campaign and one occurring at some point after a union has been certified as bargaining representative. Provided that the Labor Board, after being given the benefit of all doubts, is found to have "reasonable cause" to believe that a bargaining violation has occurred, the employer would have to bargain about the shutdown that the employer claims was economic. To require such bargaining prior to an adjudication of whether the General Counsel of the Board has sustained his burden of proof that the shutdown was impelled by unlawful motives is to

effectively make shutdowns of all kinds a mandatory subject of bargaining, a result which is contrary to a long line of precedent.

The departure from the rule would be especially striking in the case at bar, where no bargaining relationship existed at the time of the shutdown. The claim is that the shutdown, allegedly for unlawful reasons, "created" the bargaining duty, although the Labor Board has yet to adjudicate whether the shutdown itself was for unlawful reasons.

Finally, there are various reasons not to direct the issuance of a bargaining order similar to the one in Seeler v. Trading Port, Inc., supra.

In Trading Port, the bargaining order was a continuing one, the employer having continued in business. In this case, the bargaining order would, at most, have the effect of directing bargaining on a particular subject, a form of relief that, as shown, prejudices the position of the employer and is hardly likely to be fruitful.

It is questionable besides whether "one-shot" relief is appropriate to an injunctive remedy designed to prevent the commission of recurring violations of the Act.

Most significantly, the purpose of the bargaining order in Trading Port was to prevent the erosion of the Union's strength during the period before final adjudication by the Board. The order had no independent aim. In the instant case,

the effect of the shutdown upon the Union's position is a matter to be considered separately (infra); if a reopening order is not directed, the possibility that a "one-shot" bargaining order would be helpful to the Union is, as the Labor Board grants, remote and would have no effect one way or the other in "preventing erosion" of the Union's position in a unit that contains no employees.

For these reasons a bargaining order in this case would be without meaning and would not be justified in view of the bargaining rules upheld in many other cases.

V.

THE DISTRICT COURT'S ORDER PROTECTS
THE STATUS QUO IN THE ONLY EQUITABLE
WAY AND ALSO PROTECTS THE INTEREST
OF EMPLOYEES, THE ACT AND THE PUBLIC.

The Labor Board contends that a reopen-and-bargain order is the only way to preserve the status quo and prevent the frustration of the purposes of the Act.

If the Pension Committee is ordered to reopen, the status quo that would be preserved would be the unreimbursed outflow of money at the rate of \$1 million a year prior to an adjudication of the merits of the case. Instead of doing that the district court preserved the status quo by directing that everything be preserved in case the ultimate adjudication requires that the Dental Department reopen exactly as before. A court disposed to exercise its equitable powers while giving weight to the public interest will have little difficulty choosing between the status quo sought by the Labor Board and the status quo provided by the district court herein.

The relief granted by the court not only preserves the status quo to the extent feasible and permissible, but assures that the purposes of the Act will not be frustrated if a violation is found.

As matters stand pursuant to the injunction appealed from, the dentists and dental assistants who were let go when the Dental Department shut down may keep whatever positions they obtained subsequent to the shutdown and collect back pay if, upon final adjudication, they are held entitled to back

pay. In this fashion the disruption to their lives that would ensue upon an interim reinstatement order followed by a dismissal of the Labor Board's Complaint is avoided, while complete financial protection is maintained. At the same time the Pension Committee's resources are kept for eventual use by the Pension Committee as it deems proper, subject to an adverse finding and the terms of the injunction.

The effect of the district court's order upon the Union's organizing drive is not likely to be harmful.

To appreciate why this is so, one need only compare the factual situation in this case with that in Seeler v. Trading Port, Inc., supra. There the employer continued in business as before, the only difference being that, absent an interim bargaining order, it could have ignored the successful organizing campaign among its employees until a final adjudication was reached. This Court noted that when a bargaining order finally would issue, it might be too late to be of interest to employees long accustomed to seeing their employer successfully flout the law while the Union languished.

In the instant case, an eventual finding by the Board and the Courts that is adverse to the Pension Committee would result in a substantial back pay order. It would also probably lead to the reopening of a Department closed since April 30, 1976. The penalty suffered by the employer would be as substantial as the benefit to the terminated employees. Under these conditions, a bargaining order resulting from the

Union's efforts would not likely be greeted with employee apathy or timidity.

If, however, the Labor Board is correct in its statements, it should be noted that the results that it fears (albeit unrealistically) would have followed by this time, eight months after the shutdown. To argue, as the Labor Board does, that with the passage of more time some dentists may retire or move away is to lay at the doorstep of the Pension Committee conditions that have very little, if anything, to do with the shutdown of the Dental Department and that can have no effect upon the efficacy of any bargaining order that may issue after an adjudication of the merits.

Finally, the most important component of the public interest was not mentioned by the Labor Board. If the Dental Department were ordered to reopen, another benefit would have to be eliminated. That benefit probably would be the Medical Department. As the Pension Committee's Director of Administration testified, the thousands of participants served by the welfare plan depend upon the Medical Department for diagnoses that often restore their health, and in some cases save their lives and the lives of members of their families. (The Board's occasional suggestion that the benefits be juggled in some fashion is not only extremely unwise, but well beyond the competence of the Labor Board to suggest.) Surely there is something to be said for the public's interest in continuing to be served by the Medical Department rather than the Dental Department, if a choice has to be made.

CONCLUSION

For the foregoing reasons the order of the district court should be affirmed.

Respectfully submitted,

Donald F. Menagh
Donald F. Menagh

Counsel to Appellees,
JOINT INDUSTRY BOARD OF THE
ELECTRICAL INDUSTRY, et al.

Irwin Geller,
of counsel

APPENDIX

National Labor Relations Act, as amended, 29 U.S.C.


160(j), Section 10(j)

"The Board shall have power upon issuance of a complaint in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper."

CERTIFICATE OF SERVICE

I hereby certify that on this date I mailed
two (2) copies of the Brief for Respondents-Appellees
to the National Labor Relations Board, 1717 Pennsylvania
Ave., N.W., Washington, D.C. 20570 (Attn.: Milford R.
Limesand, Deputy Assistant General Counsel).

Dated: New York, N.Y.
December 27, 1976



Donald F. Menagh
Attorney for Respondents-
Appellees